IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-315

PETER VARIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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- X

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Peter Variano, respectfully prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review that Tribunal's determination of March 14, 1977, whereby it affirmed a judgment of the United States District

Court for the Southern District of New York convicting the petitioner and others of violating 18 U.S.C. 1955 (gambling) after trial before Carter, D.J., and a jury.

Permission of an Associate Justice of the Supreme Court was obtained allowing petitioner until August 28, 1977, to file this Petition.

OPINION BELOW.

The opinion of the Court of Appeals, 2nd Circuit, is reproduced in this Petition as an Appendix.

JURISDICTION.

The jurisdiction of this Court is predicated upon 28 U.S.C. §1254(i) and U. S. Sup. Ct. Rule 22(2). A petition for rehearing was denied on June 29, 1977, but Associate Justice Thurgood

Marshall signed an order extending petitioner's time to file this Petition until August 28, 1977.

QUESTIONS PRESENTED.

1. Whether the dismissal of the Conspiracy Count by the trial judge after the Government's case, precluded the submission of the substantive count under 18 U.S.C. §1955 which rests on a conspiracy theory since it requires five or more persons to be acting in concert to constitute a violation thereof?

A. This raises the adjunct question as to whether the submission of the 18 U.S.C. §1955 count constituted double jeopardy and collateral estoppel.

2. Whether prejudicial error was perpetrated when the prosecution's witness, Francis Millow, was permitted to

invoke the privilege against self incrimination in the presence of the jury?

3. Whether petitioner was denied a fair trial by virtue of the fact that the trial judge never marshalled the evidence and moreover never informed the jurors which "five or more" persons could be involved with Variano to constitute a violation of 18 U.S.C. §1955?

A. This presents the concomitant problem of whether the jurors were unanimous in their verdict since they could have divided on which group of "five or more persons" were allegedly involved with Variano to violate §1955.

4. Whether petitioner was deprived of a fair trial by virtue of the trial court's refusal to dismiss the indictment or at least suppress the electronic surveillance because there was no minimization of the interception by such electronic surveillance?

5. Whether the error set forth in Question 4, *supra*, was exacerbated by an apparent failure to properly seal the tapes?

6. Whether a mass conspiracy trial such as this *ipso facto* prejudiced the petitioner since it precluded a fair trial because of the spill over effect of the prejudice and the impossibility of the jurors to properly segregate the facts as to one defendant from the others?

7. Whether the petitioner was deprived of a fair trial by the omission of the trial judge to inform the veniremen what the effect of his dismissal of the conspiracy count was with respect to their consideration of evidence admitted only on a conspiracy theory, especially since more than one conspiracy was held to have been proved by that judge?

A. Even assuming evidence could be adduced on a conspiracy theory because it was charged in the indictment, could the jury consider evidence dealing with a conspiracy never charged in the indictment which in fact occurred herein?

STATUTES INVOLVED.

The Fourth, Fifth, and Sixth Amendments of the U. S. Constitution are involved, as 18 U.S.C. §§1955 and 2510-2520, as well as 371.

BACKGROUND OF THE CASE.

Petitioner and seven others were initially charged in a two-count true bill, dated April 14, 1976, with conducting an illegal gambling business in violation of 18 U.S.C. §1955 and conspiracy to do so under 18 U.S.C. §371 (Counts II and I, resp.).

Motions to suppress certain tapes of electronic surveillance were made in advance of trial, but Judge Carter denied them. Four of the defendants pleaded guilty, Evangelista reserving his right of appeal. Motions to suppress were made and denied with respect to certain searches and seizures as well.

The government sought to prove the existence of numbers, sports and horse-racing gambling operations in Westchester and Bronx Counties in New York beginning in 1968 and continuing until 1975.

It is the law of the case that more than one conspiracy was presented by the government, but since only one was charged in the indictment, the trial Court dismissed the conspiracy charge altogether.

The prosecution adduced evidence that customers placed bets with "runners"

who delivered them to "Pick-up" men, who in turn brought the bets into the "bank," the so-called hub of the operation.

Bearing in mind that the conspiracy count was dismissed and that it was necessary that "five or more persons" are involved in the substantive charge which alone was the subject of the conviction (§1955 of title 18 U.S.C.), it is important to note that the evidence against Variano, the petitioner herein, came from the lips of Angelina David and to a lesser extent from an agent, Douglas Wilhelmi.

Only four persons were on trial, although a number of others were mentioned during the trial. There is no way of determining which "five or more persons" the jury relied upon so far as Variano is concerned, since the trial judge never

instructed the jurors on this important issue, nor did it marshall the evidence.

Our position is that once the conspiracy charge was dismissed, the charges under §1955 should have been dismissed at least against petitioner, since there was insufficient evidence as a matter of law linking him with "five" persons, let alone more than five.

During the government's case, the witness Francis Millow was counted upon to clinch the case against Variano and others. Millow however, had indicated that he would not testify and would claim his Fifth Amendment privilege against self incrimination if called. The Government did call him and he did take the "Fifth" in the presence of the jury and in fact was then held in contempt by the trial judge, thus creating egregious error. Manifestly, no evidence against

petitioner was adduced from this witness, thus rendering the case insufficient.

The trial prosecutor created additional error aided by the Court when he was permitted to conduct a voice identification hearing in the presence of the jurors during which he in effect indicated that the questioned voice was in fact that of the petitioner.

POINT I.

THE DISMISSAL OF THE CONSPIRACY COUNT PRECLUDED THE SUBMISSION OF THE SUBSTANTIVE COUNT (18 U.S.C. §1955) TO THE JURY SINCE §1955 ITSELF NECESSARILY REQUIRES JOINT OR CONCERTED ACTION BY AT LEAST FIVE PERSONS. *A FORTIORI* THE COURT SHOULD NOT HAVE SUBMITTED IT.

We realize that this Court has access to all of the proceedings and briefs and papers filed with the courts below. We wish to emphasize that a perusal of the trial transcript will reveal that the

trial judge found that the conspiracy charge could not and should not be submitted because more than one conspiracy was presented by the Government, although only one was charged in the indictment.

Since §1955 necessarily involved five or more persons, we maintain that the substantive charge too had to be dismissed.

This Court held in *Kotteakos v. United States*, 328 U. S. 750, 773-74 multiple conspiracies could not be presented to a jury, at least not where only one was charged in the indictment. See, *United States v. Bertolotti*, 529 F. 2d 149 (2 Cir. 1975).

POINT II.

THERE WERE ONLY FOUR DEFENDANTS ON TRIAL, ALTHOUGH A NUMBER OF OTHER CONSPIRATORS WERE ALLUDED TO DURING THE TRIAL. SINCE THE TRIAL JUDGE DIDN'T MARSHALL THE EVIDENCE AND DID NOT INSTRUCT THE JURY ON THE EFFECT OF HIS DISMISSAL OF THE CONSPIRACY COUNT, COUPLED WITH THE FACT THAT HE DID NOT DELINEATE WHICH FIVE OR MORE PERSONS WERE LINKED WITH VARIANO, IT IS OBVIOUS THAT THE JURORS MIGHT WELL HAVE BEEN DIVIDED ON THE ISSUE OF WHICH GROUP OF FIVE PERSONS WAS INVOLVED IN THE CRIME, AND THAT THE VERDICT WAS THEREFORE NOT UNANIMOUS.

The trial Court did not marshall the evidence in this rather complicated case, and worse, did not explain to the jury what the effect was of his dismissal of the conspiracy charge. A good deal of evidence was let in on the theory of "conspiracy," but the trial judge ruled that at least one conspiracy, not charged in the indictment, had been presented to the veniremen, and thus dismissed the conspiracy altogether.

The jurors therefore necessarily had a good deal of evidence before them which *but for* the conspiracy count would have been inadmissible. We recognize that if a count in an indictment is not proved that this is not a cause for dismissal because evidence would have been excluded if the count had never been in the true bill in the first place. But in the case at bar, we have the added fact that a conspiracy *not* charged was also presented, and certainly as to the evidence thereon, the jury should never have heard the testimony at all. At least they should have been instructed to disregard it.

Since there were two separate groups of five persons allegedly mentioned by the Judge, but no marshalling of the evidence, it is obvious that the jurors might very well have failed to apply a proper standard in arriving at a verdict.

In other words, unless the same five persons were used by all of the jurors in arriving at their verdict, the verdict would have been defective because it would not have been unanimous.

Where a jury may have convicted on an unproved specification, a new trial should be granted, as held in *Yates v. United States*, 354 U. S. 298, 312 (1957), where the Court stated:

> "We think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is important to tell which ground the jury selected."

See, also, *Stromberg v. California*, 283 U. S. 359, 367-68 (1930); and,

Street v. New York, 394 U. S. 576, 585-86 (1969).

This principle has not been limited to cases involving constitutionally invalid statutes, as the Government had suggested in its unsuccessful argument in *United States v. Natelli, supra.**

In *United States v. Guterma*, 281 F. 2d 742, 747 (2 Cir. 1960), this Court reasoned:

> "The two prosecutions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale."

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* See pages 7 and 8 of Government's Petition for Rehearing in *Natelli*. In *Vitello v. United States*, 425 F. 2d 416, 419 (9th Cir. 1970), the Court explained that "The teaching of [*Yates*] should be here applied if we find...that there was insufficient evidence to be submitted to the jury on any one or more of the specifications of falsity..."

See, also, *United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki*, 358 U. S. 613, 619 (1959), and *United States v. Driscoll*, 449 F. 2d 894, 898 (1st Cir. 1971).

POINT III.

THE PETITIONER WAS PREJUDICED WHEN THE WITNESS MILLOW, CALLED BY THE GOVERNMENT, ASSERTED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IN THE PRESENCE OF THE JURY; AN OCCURRENCE THE GOVERNMENT COULD WELL HAVE ANTICIPATED.

Francis Millow, a co-conspirator, was called by the prosecution with the hope that he would piece together a number of disjointed aspects of the case. The witness however, clearly indicated that he did not want to testify and would assert his fifth amendment privilege if called.

Notwithstanding this, the government nevertheless called Millow and not

surprisingly, he invoked his privilege in the presence of the jury.

This Court has condemned such occurrences (*Namet v. United States*, 373 U. S. 179, 186; *United States v. Maloney*, 2 Cir., 262 F. 2d 535). In over-ruling *Delli Paoli v. United States*, 352 U. S. 232, in *Bruton v. United States*, 391 U. S. 123, this Court held that even an instruction to disregard the occurrence [there a confession] is insufficient to eliminate the prejudice.

As in *Maloney, supra*, cited in *Namet, supra*, we maintain that there was prosecutorial misconduct in calling this witness in the first place, under the circumstances as occured herein which were exacerbated by holding the witness in contempt.

Since the refusal to testify occurred in the presence of the jury, it

unquestionably gave the impression that the witness had been frightened into silence by the petitioner and others. It is inconceivable that this event could not have been anything but highly prejudicial to the defense. The fact that the prosecution called this witness is enough to charge them with the prejudice, irrespective of the remote possibility that it may not have been intentional. (*Cf. Brady v. Maryland*, 373 U. S. 83).

In *United States v. Maloney*, 262 F. 2d 535 at 537 (2 Cir. 1959), Judge Learned Hand condemned this practice, explaining:

> "If the prosecution knows when it puts the question that he will claim the privilege [against self-incrimination] it is charged with notice of the

probable effect of his refusal upon the jury's mind."

See also, *Fletcher v. United States*, 332 F. 2d 724 (1964, D. C. Cir.), and *People v. Pollock*, 21 N. Y. 2d 209.

POINT IV.

IT WAS *IPOS FACTO* PREJUDICIAL TO HAVE JOINED THESE DEFENDANTS AND PETITIONER IN THE SAME TRIAL, ESPECIALLY IN VIEW OF THE FACT THAT THE COURT FOUND THAT MORE THAN ONE CONSPIRACY HAD BEEN PRESENTED BY THE EVIDENCE.

The trial Court denied a severance. The mass conspiracy trial has been condemned and it is patent that a fair trial is virtually impossible.

It may be argued that since only four defendants among many conspirators actually went to trial here, the "mass" trial was not as pronounced as in some other cases.

But this Court must bear in mind that there was more than one conspiracy presented herein and thus severances should have been granted or the evidence should more carefully have been explained and the Court should have marshalled it for the jury (see, *Krulewitch v. United States*, 336 U. S. 440, 457; *Hyde v. United States*, 225 U. S. 347, and *Kotteakos v. United States*, 328 U. S. 750, 773).

POINT V.

TAPES OF ELECTRONIC SURVEILLANCE WERE NOT TIMELY SEALED, NOR WERE THEY PROPERLY MINIMIZED.

The law is clear that if the Government elects to utilize electronic surveillance, it must apply *strictissimi juris* standards in observing the statutes under which such surveillance is conducted.

In the case at bar, it is not disputed that there was no minimization since the tape machine was never turned off during the period of surveillance, and there was a delay in sealing.

It is manifest that in 18 U.S.C. 2510-2520 that prompt sealing is required and that minimization if mandated as well.

See, *United States v. Gigante*, 2 Cir. 1976, 538 F. 2d 502; *People v. Sher*, 38 N. Y. 2d 600; and *People v. Nicoletti*, 35 N. Y. 2d 249. *Cf. Alderman v. United States*, 394 U. S. 165.

-A-

IN CONNECTION WITH THE ELECTRONIC SURVEILLANCE, ERROR WAS COMMITTED BY A VOICE IDENTIFICATION HEARING IN THE PRESENCE OF THE JURY DURING WHICH THE PROSECUTOR IN ESSENCE VOUCHED THAT THE CONTESTED VOICE WAS THAT OF PETITIONER.

During the trial, an issue had to be resolved as to whether a voice on a tape was that of petitioner. This was during Agent Wilhelmi's testimony at a voice identification hearing conducted in the presence of the jury. Conducting this hearing in the jury's presence was error enough, since if the Court ruled it out, the veniremen would have heard much about it already. Be that as it may, the prosecutor told the court and jury that he expected the Agent to identify the disputed voice as that of Variano (see Trial Tr. 1154-1167).

CONCLUSION.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 431, 364, 418
432, 472, 473—September Term, 1976.

(Argued November 29, 1976 Decided March 14, 1977.)

Docket Nos. 76-1335, 76-1358, 76-1359,
76-1360, 76-1354, 76-1442

UNITED STATES OF AMERICA,

Appellee,

—against—

PETER VARIANO, HENRY BUCCI, ANTHONY RUSSILLO, MICHAEL DEMICHAELS, JOHN MONACO, and MICHAEL EVANGELISTA,

Defendants-Appellants.

Before:

MOORE, ANDERSON and FEINBERG,
Circuit Judges.

Appeal from judgments, entered in the United States District Court for the Southern District of New York, Honorable Robert L. Carter, *Judge*, convicting appellants of conducting an illegal gambling business in violation of 18 U.S.C. § 1955.

All convictions affirmed.

MICHAEL D. ABZUG, Special Attorney, Department of Justice, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for

the Southern District of New York, Audrey Strauss, Assistant United States Attorney, of Counsel), *for Appellee.*

IRVING ANOLIK, Esq., New York, New York, *for Defendant-Appellant Variano.*

JERALD ROSENTHAL, Esq., New York, New York (Irving Katcher, of Counsel), *for Defendant-Appellant Bucci.*

B. ALAN SEIDLER, Esq., New York, New York, *for Defendant-Appellant Russillo.*

EDWARD PANZER, Esq., New York, New York (Julia P. Heit, of Counsel), *for Defendant-Appellant DeMichaels.*

ARMENDE LESSER, Esq., New York, New York, *for Defendant-Appellant Monaco.*

HAROLD DUBLIRER, Esq., New York, New York (Paul A. Victor, of Counsel), *for Defendant-Appellant Evangelista.*

MOORE, *Circuit Judge:*

Peter Variano, Henry Bucci, Anthony Russillo, Michael DeMichaels, John Monaco and Michael Evangelista appeal from judgments convicting them of conducting an illegal gambling business in violation of 18 U.S.C. §1955.

Appellants and seven other defendants were initially charged in a two-count indictment, dated April 14, 1976, with conducting an illegal gambling business in violation of 18 U.S.C. §1955 (Count II) ("the substantive count") *and* with conspiring to conduct an illegal gambling business in violation of 18 U.S.C. §371 (Count I) ("the con-

spiracy count"). On April 26, 1976, an evidentiary hearing was held before Judge Carter of the Southern District of New York, to resolve various motions to suppress made by several of the defendants. Judge Carter denied all of the motions. On April 27 appellant Evangelista and three of the other defendants pleaded guilty to the substantive count of the indictment. Evangelista reserved his right to appeal the denial of his motion to suppress.

The trial before Judge Carter and a jury commenced on that same day. At the close of the Government's case, Judge Carter dismissed the conspiracy count on the ground that there was a variance between the Government's theory and its proof: the Government's evidence made out a case of multiple conspiracies, rather than the single conspiracy alleged in the indictment. The defendants had also moved to dismiss the substantive count, and they now asserted that this dismissal was required by Judge Carter's dismissal of the conspiracy count. Judge Carter denied the motion.

None of the defendants offered any evidence. The substantive count went to the jury. On May 6 the jury returned guilty verdicts as to appellants Variano, Bucci, Russillo, DeMichaels, and Monaco, and one of the other defendants. Judge Carter entered judgments of conviction as to Evangelista on June 8, and as to the other five appellants on July 8.

Each of the appellants raises several issues on appeal—the "spillover" of evidence from the dismissed conspiracy count to the remaining substantive count, a variance in the proof as to the substantive count, insufficiency of the evidence as to certain of the appellants, prejudice resulting from a Government witness' invocation of the Fifth Amendment and his citation for contempt in front of the jury, an illegal search and seizure, improprieties in wire-

tap procedure, and prejudicial remarks by a Government witness and by the prosecutor.

We have considered each of the issues raised very carefully and discuss several of them below. We find all of the issues to be without merit and we affirm the convictions.

Facts

The Government's evidence established the existence of numbers, sports and horse gambling operations in the Bronx and Westchester beginning in 1968 and continuing until 1975. The cast of characters varied, but the pyramidal set-up remained essentially the same: Customers placed their bets with "runners" in the local candy store, soda shop, or bar. "Pick up" men collected the wagers for the runners and brought them into the "bank"—the nerve center of the operation. The wagers were in envelopes bearing the runner's code on the outside. Each runner was referred to as an "account". At the bank, the wagers were tallied and when the results of the numbers, sports or horse events in question came in, the "hits" were also tallied. A "tape" was then made recording each account's total tally of wagers and hits. The bank determined how much money each account owed its customers, and placed this amount in an envelope. The envelopes were delivered to the individual runners who then paid off their winning customers, after deducting their own commissions.

Michael Yannicelli[1] was the "bank" of the operation here in question from 1968 until 1972. Michael Calise[2] testified

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1 Yannicelli pleaded guilty to both counts of the indictment on April 27, 1976. He has not appealed.

2 Michael Calise was initially indicted for the crimes of promoting gambling in the first degree and possession of gambling records in the first degree. He then jumped bail but was later apprehended. He agreed to cooperate with the Government after being permitted to plead guilty to a misdemeanor and receiving a suspended sentence.

that he worked as a "runner" and as a "pick-up man" for the operation during this period. He stated that appellant DeMichaels was one of Yannicelli's accounts. DeMichaels was what was known as a "half-sheet dealer." Rather than taking bets from customers himself, he had several runners working for him. In each week that he came out ahead—i.e., the wagers placed with his runners were greater than his customers' hits—he split his profits with Yannicelli. Conversely, when hits exceeded wagers, Yannicelli paid the customers and recovered the amount paid from DeMichaels the next time he came out ahead. Calise stated that Francis J. Millow[3] was one of DeMichaels' runners.

The evidence showed that DeMichaels and Millow continued collecting wagers after 1972, but that in this later period, their accounts were with appellant Variano, rather than with Yannicelli. Variano's operation was broader than Yannicelli's—it encompassed gambling on football games, as well as on numbers and horses. Variano's one-time girlfriend, Angelina David, testified that, at Variano's request, she did the bookkeeping for the football end of the operation. David stated that she accompanied Variano to various motels where he met his pick-up men and collected their wagers and money. Each Saturday Variano gave David bags containing the money and wagers. David tallied the wagers and delivered her computations to Variano. Variano received the results of the football games on Sunday night and he and appellant Bucci then determined which bettors, if any, had made "hits". They made a master tape of each account's wagers and hits and delivered envelopes to each account containing the money it owed its bettors.

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3 Millow is an unindicted co-conspirator who was granted immunity by the Government and was subpoenaed to testify at appellants' trial.

There was evidence that Millow, and appellants Bucci, Russillo and DeMichaels all had accounts with Variano. The "pick-up" network appears to have been slightly more complicated than the one during the earlier "Yannicelli" period. Bucci, Russillo and DeMichaels apparently delivered some of their wagers to Millow, who in turn phoned them to appellant Evangelista.[4] Evangelista placed the wagers on coded slips of paper and gave them to several people, including appellant Monaco. The Government's evidence establishing this network included gambling records and paraphernalia seized from various of the appellants, physical surveillance of their comings and goings, and electronic surveillance of their telephone conversations.

At the close of the Government's case, Judge Carter determined that at least two, and possibly three, distinct time frames had been set forth. He concluded that the Government had made out a case of multiple conspiracies, rather than the single conspiracy alleged in the indictment. On the ground of this variance between the Government's theory and its proof, Judge Carter dismissed the conspiracy count.

Dismissal of the Conspiracy Count

After Judge Carter dismissed the conspiracy count, appellants moved that he also dismiss the substantive count on two grounds: (1) the Government was collaterally estopped from proving the substantive count once the similar conspiracy count had been dismissed; and (2) there was a prejudicial "spillover" of evidence admitted solely because of the conspiracy count. Judge Carter refused to dismiss the substantive count. With this refusal we agree.

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4 Theresa Belardo testified that Evangelista paid her in order to use her telephone for incoming calls during set hours each day.

Little need be said regarding the first prong of appellants' argument — collateral estoppel. Variano and DeMichaels contend that since the substantive statute, 18 U.S.C. §1955,[5] requires the participation of "five or more persons", it requires conspiratorial conduct, and thus once Judge Carter had determined that there was no single conspiracy, the Government was collaterally estopped from proving a violation of the substantive statute.

The doctrine of collateral estoppel does not apply to the facts of this case. Judge Carter did not find that there was no conspiracy; he found that there was no *single* conspiracy. He found one conspiracy in existence during the period from 1968 to 1972, and at least one other, distinct conspiracy in the period from 1973 to 1974. In this later period Judge Carter named two groups of five persons the evidence linked to one aonther: Variano, Colletti, Bucci, Russillo and Millow; and Picciano, Ostrander, Monaco, Evangelista and Murty.[6] As to the earlier period, Judge Carter named only Centore and DeMichaels, but

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5 18 U.S.C. §1955 provides in part as follows:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $20,000 in any single day.

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6 Murty pleaded guilty to Count II and the jury found Picciano guilty of Count II. Neither has appealed. The jury found Ostrander not guilty.

stated that it was his recollection that "a larger number of people" were involved. We would add to Judge Carter's recollection the names Calise, Yannicelli, and Millow. Thus, when Judge Carter's dismissal of the conspiracy count is analyzed, it becomes clear that it had no collateral estoppel effect whatsoever on the remaining substantive count of the indictment.

The second prong of appellants' argument for dismissal of the substantive count is that the dismissal of the conspiracy count removed the only reason for the prejudicial joinder of the defendants. Moreover, evidence which had been admitted solely on the ground of the conspiracy count had a "spillover effect" on the remaining substantive count. The law in this Circuit is clear. Appellants can only succeed in this argument if they show bad faith on the part of the Government in bringing the conspiracy charge, or if they show prejudice. *United States* v. *Aiken*, 373 F.2d 294 (2d Cir. 1967). *See also, United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *United States* v. *Miley*, 513 F.2d 1191 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); and *United States* v. *Ong*, 541 F.2d 331 (2d Cir. 1976).

Only one appellant, Bucci, alleges bad faith on the part of the Government. He states conclusorily that the Government's sole purpose in bringing the conspiracy charge was to "inundate the jury with the weight of governmental activities, state and federal; spiced with violence and corruption in a mass trial." (Bucci Brief at 14.) What Bucci ignores is that the Government had good reason to believe that its conspiracy charge would be supported by its evidence at trial. The Government was counting on Millow's testimony to tie together the two time frames found by Judge Carter. Millow had been granted immunity, and

thus the Government was genuinely surprised when he refused to testify. The Government's good faith in this case is evident.

Appellants' allegations of prejudice cause us more hesitation. This Court, in the past, has looked at several factors, including the number of substantive counts, the number of defendants, the length of the trial, the extent of the permissible evidence against each defendant, and the extent of the judge's cautioning instructions to the jury. Thus in *United States* v. *Branker, supra,* the Court found prejudice as to three of the eight defendants, who were charged in only a few of the 80 counts, and whose names appeared in only a very small part of the transcript of the five-week trial.

Here, on the other hand, the trial lasted only eight days and involved only one substantive count. The only testimony which was admissible solely on account of the conspiracy was a portion of Calise's testimony on the first day of trial. Judge Carter continually instructed the jury against use of this testimony, and the jury's questions and its split verdict evidenced an understanding of these instructions. In sum, we find no prejudice resulting to defendants from their joinder at trial.

Millow's Invocation of the Fifth Amendment

We also find no prejudice resulting to any of the defendants from Millow's invocation of the Fifth Amendment and citation for contempt by Judge Carter in front of the jury. Millow had been granted immunity, and the Government had no reason to suspect that he would refuse to testify when he took the stand—the Government could not conduct a dress rehearsal.

Judge Carter handled the unfortunate situation reasonably. Immediately after Millow asserted his Fifth Amend-

ment privilege, Judge Carter excused the jury and explained to Millow that he was required to testify under his grant of immunity. Judge Carter then recalled the jury and directed the Government to ask Millow the same question he had previously refused to answer.[7] When Millow said that he needed the assistance of his attorney because he was afraid of perjuring himself, Judge Carter cited him in contempt.

Appellants' allegation of prejudice from this incident—that the jury was left with the impression that Millow's silence was caused by his fear of appellants—is highly speculative. Moreover, it appears to be an afterthought as none of the appellants requested a curative instruction at the trial.

Search of Monaco's Car

Monaco moved to suppress the introduction of gambling records seized from his car under the following circumstances: On September 3, 1974, Officer James Trotta of the Yonkers Police Department observed Monaco driving in a car with a cracked windshield. Knowing, in addition, from a prior incident, that Monaco did not have a valid driver's license, Trotta caused Monaco to stop. After confirming that Monaco had no license, Trotta informed him that he would be issued a summons and that his car would be impounded. Trotta then entered Monaco's car to drive it to police headquarters for impoundment. As he pulled away from the curb, the gambling records in question fell from the sun visor.

Monaco has not contested this version of the facts, as testified to by Officer Trotta, and on these facts, the seizure

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7 Millow had already answered five questions about his personal background. He asserted his Fifth Amendment privilege when he was asked whether he knew appellant Bucci. When Millow refused to answer this question, the Government refrained from asking him any further questions.

was clearly legal. Once Trotta learned that Monaco did not have a license, it was not "unwarranted either in terms of state law or sound police procedure," *Cady* v. *Dombrowski,* 413 U.S. 433, 447 (1973), for him to move the car off the street himself. Moreover, Trotta's entry into the car was a proper incident to Monaco's impending arrest. The lawfulness of his seizure of the gambling records which thereupon came into plain view is beyond question. *Harris* v. *United States,* 390 U.S. 234, 236 (1968); *United States ex rel. LaBelle* v. *LaVallee,* 517 F.2d 750, 755 (2d Cir. 1975), *cert. denied,* 423 U.S. 1062 (1976).

The Wiretap Evidence

Evangelista moved to suppress tapes of telephone conversations to which he was a party on the ground that he received no post-termination notice, in violation of N.Y. Crim. Proc.L. §700.50(3).[8]

On November 8, 1976, Westchester County Judge Richard Daronco issued a wiretap order on the phone of Anthony J. Millow. Among the conversations subsequently intercepted on this phone were several between Francis Millow and appellant Evangelista. Fourteen days after the termination of a renewal order for the wiretap on Millow's phone, Judge Daronco directed the issuance of notice to sixteen persons. Evangelista was not one of the sixteen. The Government's explanation is that Evangelista's voice was not identified on the tapes.

Since Evangelista was not named in the wiretap warrant, his right to receive post-termination notice was in

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8 N.Y.Crim. Proc.L. §700.50(3) provides, in pertinent part, as follows:

"Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant . . . written notice . . . must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice."

the discretion of Judge Daronco. If, in fact, Evangelista's voice was not identified after reasonable efforts, then the failure to give him notice was clearly not an abuse of discretion.

Moreover, even if, as Evangelista contends, the Government should have recognized his voice on the tapes in question,[9] the failure to give him notice does not require suppression of the tapes. We held in *United States* v. *Principie*, 531 F.2d 1132 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3586 (March 1, 1977), that the defendant must show prejudice before a motion to suppress will be granted on the ground of a failure to give post-termination notice, in violation of N.Y. Crim. Proc.L. § 700.50(3) and 18 U.S.C. § 2518(8)(d). This point, which was in dispute among the circuits, was resolved by the Supreme Court in *United States* v. *Donovan*, 45 U.S.L.W. 4115 (January 18, 1977). Reversing a Sixth Circuit holding that the failure to give notice, even absent a showing of prejudice, mandated suppression, the Court stated:

> "Nothing in the structure of the Act [Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520] or this legislative history suggests that incriminating conversations are 'unlawfully intercepted' [and thus required to be suppressed under 18 U.S.C. § 2518(10)(a)] whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. . . . The fact that discretionary notice reached 39 rather than 41 identifiable persons does not

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9 Evangelista notes that he was under physical surveillance during the period of the wiretap and that at the moment of his arrest on December 31, 1974, he was on the phone and being recorded.

in itself mean that the conversations were unlawfully intercepted.[26]"

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26 • • •

"Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive post-intercept notice. . . . [T]he Government made available to all defendants the intercept orders, applications, and related papers. . . . And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations." 45 U.S. L.W. at 4122.

Evangelista, similarly, was not prejudiced by the failure to provide him with notice. Six weeks before the trial, the Government provided Evangelista with all of the orders, applications and other papers relating to the wiretaps in question, and in addition, made duplicate tape recordings available for his inspection. Thus under these circumstances, in the absence of any showing of prejudice, Judge Carter's denial of Evangelista's motion to suppress was correct.[10]

Convictions affirmed.

10 Evangelista argues that the New York wiretap statute involved here, N.Y. Crim. Proc.L. §700.50(3), is more restrictive than the federal statute involved in *Donovan*, 18 U.S.C. §2518(d), and that the New York statute mandates suppression, even absent a showing of prejudice. We rejected this interpretation of the New York statute in *Principie*, 531 F.2d at 1142, n.12 and reject it again here. *People* v. *Brenes*, 385 N.Y.S. 2d 530 (App. Div., 1st Dept., 1976), cited by Evangelista, holds merely that suppression is mandated in the case of a "blatant violation" by the police of the minimization requirements of the New York statute. In that case, the police had used an automatic device which "tapped and taped every single telephone conversation in full, including those concededly non-pertinent." 385 N.Y.S. 2d at 532. Such a violation is a far greater interference with the "congressional intention to limit the use of intercept procedures," *United States* v. *Giordano*, 416 U.S. 505, 527 (1974) than is the failure to give post-termination notice.

ORDER ON PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-seven.

PRESENT: HON. LEONARD P. MOORE,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MONACO, PETER VARIANO, MICHAEL DEMICHAELS, MICHAEL EVANGELISTA, LAWRENCE CENTORE, ANTHONY RUSSILLO, HENRY BUCCI, FRANK GALELLA, JAMES OSTRANDER, WILLIAM MURTY, ALFONSO COLETTI, MICHAEL PICCIANO,

Defendants,

PETER VARIANO, JOHN MONACO, MICHAEL DEMICHAELS, ANTHONY RUSSILLO, HENRY BUCCI, MICHAEL EVANGELISTA,

Defendants-Appellants.

76-1335.

- X

A petition for a rehearing having been filed herein by counsel for the appellant Peter Variano

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk.

ORDER OF THE SUPREME COURT OF THE UNITED STATES EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

- X

No. A-37

PETER VARIANO,

Petitioner,

v.

UNITED STATES.

- X

UPON CONSIDERATION of the application of counsel for petition,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the

same is hereby, extended to and including August 28, 1977.

Dated this 19th day of

July, 1977.

/s/THURGOOD MARSHALL
Associate Justice of
the Supreme Court of
the United States

ORDER OF AFFIRMANCE.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of March, one thousand nine hundred and seventy-seven.

PRESENT: HON. LEONARD P. MOORE,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MONACO, PETER VARIANO, MICHAEL DEMICHAELS, MICHAEL EVANGELISTA, LAWRENCE CENTORE, ANTHONY RUSSILLO, HENRY BUCCI, FRANK GALELLA, JAMES OSTRANDER, WILLIAM MURTY, ALFONSO COLETTI, MICHAEL PICCIANO,

Defendants,

PETER VARIANO, JOHN MONACO, MICHAEL DEMICHAELS, ANTHONY RUSSILLO, HENRY BUCCI, MICHAEL EVANGELISTA,

Defendants-Appellants.

76-1335.

- X

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/A. DANIEL FUSARO
Clerk.